(13)

Supreme Court, U.S.
FILED
AUG 6 1998
OFFICE OF THE CLERK

Nos. 97-1704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,

Petitioners,

v.

FIBREBOARD CORPORATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONERS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 50,000 members primarily represent plaintiffs in civil actions. Victims of asbestos-related disease are frequently represented by ATLA members in their civil suits.

Letters of consent of the parties to the filing of this brief have been filed with the Court.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than

ATLA does not appear before this Court as an opponent -- or a proponent -- of class actions in mass torts. Rather, ATLA's concern in this case is defined by its longstanding mission, stated in its bylaws: "To preserve the constitutional right to trial by jury." ATLA declared its position regarding class actions in a formal resolution adopted by its Board of Governors on Oct. 5, 1996:

> Class actions can be important procedural vehicles utilized by consumers and others to halt and deter wrongful conduct. However, class actions have the potential to affect individual rights, and potentially may interfere with an individual plaintiff's exercise of the right to legal counsel and the right to trial by jury. . . .
>
> ATLA believes . . . that any waiver of the right to a jury trial should be a knowing and informed choice of the plaintiff [and] that plaintiffs are entitled to counsel of their choice whose loyalty is undivided by any conflict of interest. Accordingly, ATLA opposes the implementation of class action procedures unless each claimant is afforded the fullest opportunity to exercise a knowing and intelligent waiver of jury trial and a meaningful opportunity to opt out of the binding effect of such proceedings.

In ATLA's view, affirmance of the Fifth Circuit decision would permit the misuse of class actions to eliminate the jury trial rights of future victims long before they are in a position either to exercise or intelligently waive their constitutionally guaranteed rights.

SUMMARY OF THE ARGUMENT

1. The lower court's certification under Fed. R. Civ. Pro. 23(b)(1) of a mandatory class of future claimants against Fibreboard Corp. for injury caused by asbestos and its

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amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

approval of a settlement that transfers those claims to an administrative process violate the claimants' right to trial by jury and the Rules Enabling Act.

2. The history of the Seventh Amendment demonstrates that the right to trial by jury was designed as a check on the power of government officials, and federal judges in particular. The right also safeguards the individual's interest in controlling his or her own litigation and preserves the jury as an institution of democratic self-government. The class action settlement in this case undermines each of these goals.

3. The Rules Enabling Act prohibits application of Rule 23 to abridge a substantive right, including the right to trial by jury.

The class action settlement in this case shifts the legal claims of asbestos victims, to which the Seventh Amendment applies, to an administrative compensation scheme where it does not. This is a type of denial of jury trial rights that the Seventh Amendment was specifically designed to prevent, and this Court has invalidated an attempt by Congress to evade the right to trial by jury in similar fashion.

The lower court's extension of Rule 23(b)(1) to class members whose actions at law will not accrue until some time in the future violates the constitutional protection requiring that any waiver of the jury right be knowing and intelligent.

The mandatory class action settlement of the class members' state law claims abridges state constitutional rights in violation of the Rules Enabling Act. Those include the right to trial by jury and the "open courts" guarantees in most state constitutions.

4. The "back-end opt-out" provided in the proposed settlement does not satisfy the Seventh Amendment. The plan burdens the exercise of the jury right by requiring claimants to submit to mediation and arbitration procedures before they can opt out. The plan discriminates against

claimants who have exercised their right to jury trial by requiring successful plaintiffs to wait years longer for compensation payments than claimants who choose mediation or arbitration.

The most egregious constitutional deficiency in the back-end opt-out is the ceiling of $500,000 on recoverable damages. Where the Seventh Amendment applies, the amount of damages is to be determined by the jury. A cap on the amount of damages that can be awarded is inconsistent with the Seventh Amendment. State courts have held that damage caps, even those that limit only noneconomic damages, violate state constitutional guarantees of the right to trial by jury.

5. The class action settlement could have been structured to achieve its goals while preserving the right of future claimants to trial by jury. It could have provided that claimants may choose between the settlement process and filing a tort action under state law at the time when such a tort action could be filed. Generally, this would permit claimants to make an informed choice to exercise or waive their jury trial rights during the state statute of limitations period, starting from the date when the claimant knew or should have known of the asbestos-related disease. Such a provision would have preserved the claimants' constitutional rights without crippling the class action settlement.

ARGUMENT

I. INTRODUCTION.

In the coming years, a significant number of Americans who are presently in good health will receive bad news from their doctors. They will have developed cancer, mesothelioma, or other disease caused by asbestos contained in the products made by Fibreboard for 50 years. If the settlement at issue in this case is approved, these future asbestos victims will get a second dose of bad news from

their attorneys. Their right to seek legal redress against Fibreboard and to put their case before a jury selected from the community will have been traded away years earlier. They will find they have been locked out of the courthouse by a deal struck by Fibreboard, its insurers, and attorneys they have never met.[2]

The class action settlement in this case resembles in many respects the settlement this Court rejected in *Amchem Products, Inc. v. Windsor*, ___ U.S. ___, 117 S. Ct. 2231 (1997). As in *Amchem*, the class action settlement in this case

> would extinguish asbestos-related causes of action of exposed individuals who currently suffer no physical ailments, but who may, in the future, develop possibly fatal asbestos-related disease. These "futures claims" of "exposure-only" plaintiffs would be extinguished even though they have not yet accrued.

Georgine v. Amchem Products, Inc., 83 F.3d 610, 617 (3rd Cir. 1996), *aff'd sub nom. Amchem Products, Inc. v. Windsor*, ___ U.S. ___, 117 S. Ct. 2231 (1997).

Extinguished too are the constitutional rights of those plaintiffs to trial by jury of their tort causes of action. In *Amchem*, this Court held that the proposed class action settlement could not satisfy Fed. R. Civ. Pro. 23(a) and 23(b)(3). The Court therefore did not specifically address the command of the Seventh Amendment that the right to trial by jury be preserved.

The lower court in this case claimed to find sufficient distinctions between the class action settlement in this case, certified under Rule 23(b)(1), and the one condemned in

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[2] Without disparaging the great effort that went into negotiating this deal, one can imagine the consternation of future victims to learn that the bargain was struck, not in the halls of Congress or even in this august Court, but at a gathering of lawyers in a coffee shop in Tyler, Texas. *See Flanagan v. Ahearn*, 90 F.3d 963, 971 (5th Cir. 1997).

Amchem. Flanagan v. Ahearn, 134 F.3d 668, 670 (5th Cir. 1998).

ATLA respectfully submits that the lower court's extension of Rule 23 to approve this class action settlement violates the class members' right to trial by jury and therefore exceeded the court's authority under the Rules Enabling Act. ATLA further submits, in Part IV, infra, that the settlement's "back-end opt-out" does not satisfy the Seventh Amendment. Finally, ATLA suggests in Part V, infra, that the settlement could have been configured to preserve the right to trial by jury without eliminating the benefits of the class action.

II. THE CLASS ACTION SETTLEMENT UNDERMINES VALUES THAT THE SEVENTH AMENDMENT WAS ADOPTED TO PROTECT

The Seventh Amendment guarantees the right to trial by jury in civil cases.[3]

This Court has repeatedly emphasized that

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 565 (1990). This Court "has carefully preserved the right to trial by jury where legal rights are at stake." *Terry, supra*, at 565.

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3 In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend vii.

The scope and effect of the Seventh Amendment "are determined by reference to the historical setting in which the Amendment was adopted." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 339 (1979)(Rehnquist, C.J., dissenting). Sadly, Americans' right to trial by jury has suffered a "gradual process of judicial erosion." *Id.* At times it has even become the object of disparagement, perhaps because its history has become overlooked or unappreciated. *See* Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History,* 44 Hastings L.J. 579 (1993).

The history of the Seventh Amendment demonstrates that it was designed to protect fundamental values that the class action settlement in this case undermines.

A. The Seventh Amendment Was Adopted As a Check On The Power Of Government, And On The Power Of Federal Judges In Particular.

The jury trial is not merely a procedural feature of our civil justice system. A war was fought, and lives lost, to win this right. The jury was immensely popular among the American colonists. They admired the heroism of Edward Bushnell and the other jurors who refused to convict Quaker William Penn in 1670, though the jurors were fined and jailed by the trial judge. *See* John Guinther, THE JURY IN AMERICA ch. 1 (1988).

The colonists rejoiced when a jury in 1688 acquitted seven Anglican bishops of seditious libel for opposing James II. The case confirmed their view of the jury "as a bulwark of liberty, as a means of preventing oppression by the Crown." Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918). "Treatises extolling the jury flooded the market and profoundly influenced eighteenth century American as well as English views about jury trial." *Id.*

The colonists cheered the jury verdicts -- including large punitive damage awards -- in the civil suits by John Wilkes and his printer against officials who conducted an illegal

search in their effort to suppress Wilkes' criticism of the government. *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (K.B. 1763), and *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (C.P. 1763). "Wilkes' case and his ongoing conflicts with the British administration were a matter of keen interest in the American colonies." Landsman, *supra*, at 591. The Wilkes verdict was cited in debates in support of the need for constitutional protection of the civil jury. *See* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788, 781-82 (John B. McMaster & Frederick D. Stone, eds. 1988)(statement of Robert Whitehall at Pennsylvania ratifying convention).

Indeed, this constitutional guarantee was critical to ratification of the Constitution itself. On Sept 12, 1787, as the Constitutional Convention was ending its work in Philadelphia, James Wilson "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." A motion to add that right to Art. III, §2, cl.3, which guaranteed trial by jury in criminal cases, failed. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 293-94 (1966). That omission suggested to many that the constitution represented "virtual abolition of the civil jury" and very nearly doomed ratification of the entire constitution. Henderson, *supra*, at 295-98; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 672 n.89 (1973).

Proponents of the right viewed the jury as an essential check on the power of federal judges. Morris S. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829, 832-35 (1980). During the ratification debates in the various states, the Antifederalists insisted that a constitutional guarantee of trial by jury in civil cases was necessary to shield the people from a national government and an unelected federal judiciary that would be too far removed from the values and concerns of ordinary citizens. James S. Campbell and Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to*

Professor Arnold, 128 Univ. of Pa. L. Rev. 965, 971 (1980); *see, e.g.* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 218 (J. Elliot 2d ed. 1836)(remarks of James Monroe at the Virginia ratification convention). Ultimately, as Justice Story recounts, the Federalists' commitment to a Bill of Rights, including jury trials in civil cases, won support for the new constitution. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830).

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, C.J., dissenting). *See also, Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 82 (1989) (White, J., dissenting) (a principal rationale for the Seventh Amendment was that "juries serv[e] as popular checks on life-tenured judges.")

Yet, over 200 years after this battle was won, asbestos victims may find that their jury rights were traded away in a deal struck by private attorneys with the active participation of the district court. In Judge Smith's forceful description, "Federal courts are not roving engines of justice careening about the land in search of wrongs to right." *Flanagan v. Ahearn*, 90 F.3d 963, 1015 (5th Cir. 1997) (Smith, J., dissenting). The Seventh Amendment exists, ATLA would add, because of the ease with which federal courts may become engines of injustice.

B. The Seventh Amendment Preserves Individual Control Over a Cause Of Action.

The Seventh Amendment recognizes that the various means of settling disputes are not fungible. To present one's grievance to a jury from the community is qualitatively different from mediation or arbitration, even where the amount of compensation is comparable.

Tort victims in particular have a "vital interest" in having some measure of control over litigation that may affect their lives. *Yandle v. PPG Indus. Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974); *Causey v. Pan Am World Airways, Inc.*, 66 F.R.D. 392, 299 (E.D. Va. 1975); *Hobbs v. Northeast Airlines*, 50 F.R.D. 76, 79 (E.D. Pa. 1970); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev 193, 286-87 (1992). *See also* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 74 ("the right to control personally the suit whereby a badly injured person seeks redress from the alleged tortfeasor has long been valued both here and in England.").

Studies of litigants reveal that their interest in seeking a jury trial goes beyond the amount of compensation recovered. In one empirical study, for example, claimants whose cases went to trial were more likely to report that justice and fairness were accomplished, compared to those whose cases were disposed of through arbitration or other means. Deborah R. Hensler, *Resolving Mass Torts: Myths and Realities*, 1989 U. Ill. L. Rev. 89, 99. Significantly, the "most frequently cited objective of lay litigants in adjudicatory proceedings was to 'tell my side of the story.'" *Id.* Other case studies confirm that plaintiffs who seek access to judicial remedies "seek something in addition to money." Judith Resnik, Dennis E. Curtis, Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 363-72 (1996).

This Court has recognized Americans' "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 116 S. Ct. 1761, 1766 (1996); *Martin v. Wilks*, 490 U.S. 755, 762 (1989). The status of the right to trial by jury as a constitutional right which may be waived only by a knowing and intelligent choice, (see part III, B, *infra*), ensures that an injured party will have at least some control over the adjudication of his or her claim.

As this Court pointed out in *Amchem*, this interest should weigh heavily in the decision to certify -- or to deny certification -- of a class under Rule 23:

> The Advisory Committee for the 1966 reform anticipated that in each case, courts would "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." Adv. Comm. Notes, 28 U.S.C. App., p. 698. They elaborated:
>
> > The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action.

Amchem, 117 S. Ct. at 2246. An earlier Fifth Circuit panel admonished that the right to opt out of a class action "is required . . . where personal monetary relief is being sought [because] the individual class members may have a strong interest in pursuing their own litigation." *Penson v. Terminal Transport Co.*, 634 .2d 989, 993 (5th Cir. 1981).

Yet the class members in this case who develop asbestos disease will discover their causes of action have been "kidnapped," and they have been "deprived of any freedom of action by being drawn involuntarily into collective litigation." Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 821 (1995).

C. The Seventh Amendment Preserves the Jury As An Instrument Of Self-Government.

The Seventh Amendment was not adopted solely for the benefit of litigants. The right to sit on a jury was viewed as a political right of immense importance to independence and self-government. *See, e.g.*, Vidram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 218 (1995); Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993); Alan Howard Scheiner,

Judicial Assessment of Punitive Damages, and the Politics of Jury Power, 91 Colum. L. Rev. 142, 144-49 (1991).

In early colonial times, the jury often acted as the central instrument of governance. Its wide-ranging activities starkly contrasted with the circumscribed operations of both the royal executive and the colonial legislature. *See* William E. Nelson, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975).

Spokesmen on all sides of the ratification debate recognized that the jury box as well as the ballot box were fundamental prerequisites to democratic self-government. The ratification debates abounded with analogies between legislatures and juries. Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 Yale L.J. 1131, 1186, 1188 (1991).

The Antifederalists in particular argued that popular representation in the judicial branch -- through juries -- was essential so that national laws, adopted by persons unfamiliar with local circumstances, would be modified in their application by representatives better acquainted with local needs and customs. Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 N.W. U. L. Rev. 74, 91-92 (1989). To the antifederalists, the absence of the civil jury "would fatally weaken the role of the people in the administration of government." Herbert Storing, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (1981). Hence, Alexis de Tocqueville observed, "the jury is, above all, a political institution, and it must be regarded in that light in order to be duly appreciated." 1 Alexis de Tocqueville, DEMOCRACY IN AMERICA 293 (Bradley rev. ed. 1945)

In short, the Seventh Amendment was designed to protect not only the civil right to have one's case tried to a jury, but also the political right to serve as a juror, a right that has been recognized by this Court. *See Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991); *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1934); *Galloway v. United States*, 391 U.S. 372, 397-400 (1943)(Black, J., dissenting).

As then-Justice Rehnquist has noted that trial by jury was important to the founders because they valued the jurors' common sense and their ability to administer the law according to the wishes of the community. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 344 (1979)(Rehnquist, J., dissenting). He added:

> the right to a jury trial was not guaranteed in order to facilitate prompt and accurate decision of lawsuits. The essence of that right lies in its insistence that a body of laymen not permanently attached to the sovereign participate along with the judge in the factfinding necessitated by a lawsuit.

Id. at 348-49.

Yet the class action settlement which is before this Court, however, largely walls off public participation, turning the claims over to the TDP ("Trust Distribution Process").

II. THE LOWER COURT DEPRIVED FUTURE CLAIMANTS OF THEIR RIGHT TO TRIAL BY JURY IN VIOLATION OF THE SEVENTH AMENDMENT, STATE CONSTITUTIONAL GUARANTEES AND THE RULES ENABLING ACT.

A. The Seventh Amendment Precludes Shifting Common Law Claims To A Non-Jury Tribunal.

The claim of an asbestos victim for monetary damages for personal injury is clearly within the Seventh Amendment guarantee of the right to trial by jury in "suits at common law." *Curtis v. Loether*, 415 U.S. 189, 196 (1974). By a perverse alchemy, the class action settlement transforms this constitutional right into little more than a coupon, redeemable only at Respondents' TDP. The alchemy in question is the lower court's breathtakingly broad extension of Fed. R. Civ. Pro. 23(b)(1) to exposure-only individuals, whose claims will accrue sometime in the future, while

limiting their recourse to the fund that Fibreboard and its insurers are willing to put up in the present.

In *Amchem*, this Court emphasized that Rule 23 must be interpreted in keeping with the Rules Enabling Act. 117 S. Ct. at 2244. When Rule 23 was adopted in its present form in 1966, the Act provided that the rules

> shall not abridge, enlarge or modify any substantive right *and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.*

28 U.S.C. § 2072 (1958 ed.)(emphasis added).[4]

As to these future victims of asbestos-related disease, ATLA submits, their right to trial by jury has been abridged and has not been "preserved."

A primary grievance of the American colonists was the extensive effort by England to avoid jury adjudications by moving civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. *See* Carl Ubbelohde, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 209-11 (1960); Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957); Wolfram, *supra*, at 654. The colonists complained bitterly of this infringement through the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence. Landsman, *supra*, at 595-97.

This Court addressed an analogous situation in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). Congress had authorized the district courts to refer claims of

[4] The Rules Enabling Act was amended in 1988, and the specific reference to the jury right was omitted. The clause apparently was deemed superfluous; Congress could not and did not authorize rules of procedure that violate the Seventh Amendment. David D. Siegel, Commentary on 1988 and 1990 Amendments, 28 U.S. C.A. § 2072 (1991).

fraudulent conveyance, which could otherwise be adjudicated by the district court, to Bankruptcy Courts. This Court held that neither Congress nor the courts may strip claimants asserting "private rights" of their Seventh Amendment guarantee of trial by jury merely by transferring the claims to a non-jury tribunal.

Justice Brennan, writing for the majority, explained that Congress may assign statutory claims involving "public rights," -- matters in which the government is a party or which are closely intertwined with a federal regulatory program -- to a forum in which jury trials are unavailable. But in "private tort, contract, and property cases," Congress may not deprive litigating parties of the Seventh Amendment's guarantee to a jury trial. 492 U.S. at 51 & 53.

Although the Court's language is directed at the power of Congress, it seems clear that the Seventh Amendment would prohibit with even greater force the attempt by a single federal judge to "conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal." *Id. See also* G. Ray Warner, *Rotten To the "Core": An Essay on Juries, Jurisdiction and Granfinanciera,* 59 U.M.K.C. L. Rev. 991, 1011 (1991).

In this case, the class action settlement seeks to transfer, prospectively, common law claims that otherwise would clearly be subject to the Seventh Amendment to a forum in which juries are not available. Absent a valid waiver, this deprivation of future claimants' right to trial by jury clearly violates the Seventh Amendment, and, additionally, the Rules Enabling Act.

B. The Class Action Settlement Violates the Constitutional Requirement That Waiver of the Right to Trial by Jury Be Knowing and Intelligent.

A party may, of course, waive the right to a jury trial. That choice must be knowing and intelligent in light of the circumstances of each case. *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938); *Adams v. United States*, 317 U.S. 269 (1942).

While *Johnson* and *Adams* involved the right to jury trial in criminal cases, this Court's opinion in *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972), a civil case, applied the same standards the Court set forth in its criminal decisions. *See Erie Telecommunications, Inc. v. City of Erie,* 853 F.2d 1084, 1095 (3d Cir. 1988).

The Courts of Appeals have held that contractual waiver of the right to trial by jury by one who has not yet suffered harm must be knowing, intelligent and voluntary. *See, Hulsey v. West,* 966 F.2d 579, 581 (10th Cir. 1992); *Leasing Serv. Corp. v. Crane,* 804 F.2d 828, 832 (4th Cir. 1986); *K.M.C. Co, Inc. v. Irving Trust Co,* 757 F.2d 752, 755-56 (6th Cir. 1985).

State courts have also recognized this right. *See, e.g., Broemer v. Abortion Services of Phoenix*, 840 P.2d 1013, 1017 (Ariz. 1992)(contractual agreement between a patient and doctor to submit malpractice claims to arbitration was unenforceable where "there was no conspicuous or explicit waiver of the right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived."); *Moore v. Fragatos*, 321 N.W.2d 781 (Mich. App. 1982)(invalidating medical malpractice arbitration agreement, and holding that civil parties are entitled to the same degree of protection regarding waiver of jury trial as criminal defendants).

In the class action context, the jury right is protected by affording absent class members, whose claims for money damages would be entitled to a jury trial "an opportunity to remove himself from the class by executing an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811 (1985). *Cf. Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dism. as improvidently granted*, 511 U.S. 117 (1994)(where Brown had no opportunity to opt out of class action, "there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*.").

The lower court manifestly abridged this right by certifying under Rule 23(b)(1) a class that was so constructed as to make notice, waiver or the opportunity to opt-out a practical impossibility.

C. The Class Action Settlement Violates State Constitutional Rights in Violation of the Rules Enabling Act.

Congress' mandate in the Rules Enabling Act that the rules of procedure "shall not abridge, enlarge or modify any substantive right" is not limited to federal rights.

The causes of action affected by the class action and settlement in this case arise under state law. Members of the class who develop asbestos disease would ordinarily bring their tort actions in state court, unless those actions are filed in or removed to federal court on the basis of diversity of citizenship. There they would have been entitled to the rights guaranteed by their state constitutions.

Foremost among these guarantees is the right to trial by jury, independently guaranteed by nearly every state constitution. Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 Catholic U. L. Rev. 737, 739 n.11 (1989)(citing 48 state constitutional provisions). Indeed many state constitutions guarantee this right in even more emphatic terms than the Seventh Amendment. *See, e.g.*, Wash. Const., Art I, § 21: "The right of trial by jury shall remain inviolate . . ."

These state constitutional guarantees afford important substantive rights. For example, state courts have struck down legislation substituting a statutory cap on damages for the jury's assessment as violative of the state right to a jury trial. *E.g., Moore v. Mobile Infirmary*, 592 So. 2d 156 (Ala. 1991); *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (Wash. 1989); *cf., Sorrell v. Thevenir*, 69 Ohio St. 3d 415; 633 N.E.2d 504 (1994)(statute mandating

reduction of jury award by amount of "collateral benefits" violates state right to trial by jury).

Additionally, 37 state constitutions contain a guarantee of a "right to a remedy" or "open courts" which have no cognate provision in the federal constitution. *See generally*, Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 615 n.218 (1981) (citing statutes). Typical of such guarantees is a provision in the Alabama Constitution:

> That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

Ala. Const., Art. I, §13.

Courts have struck down, as violative of such open court provisions, state product liability "statutes of repose" which purport to extinguish a common law cause of action for personal injury caused by an unreasonably dangerous product a fixed number of years following the sale of the product, even if the injury or disease has not yet become manifest or the plaintiff could not reasonably have discovered the injury or disease. *See, e.g., Kennedy v. Cumberland Engineering Co.*, 471 A.2d 195 (R.I. 1984); *Daugaard v. Baltic Co-op Bldg Supply Ass'n*, 349 N.W.2d 419 (S.D. 1984); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985).

These are but two of the substantive rights that members of the class would enjoy in pursuing their state law claims and by the lower court in violation of the Rules Enabling Act.

III. THE BACK-END OPT-OUT DOES NOT PRESERVE THE RIGHT TO TRIAL BY JURY.

A. The Settlement Penalizes the Choice of Jury Trial

The Fifth Circuit and Respondents assert that the settlement's provision for a "back-end opt-out" preserves the

class members' "ultimate right to resort to the tort system." 90 F.3d at 973. ATLA suggests that Judge Smith, dissenting below, is closer to the mark in characterizing the provision as "window dressing." 90 F.3d at 1006 (Smith, J., dissenting). It does not preserve the right to trial by jury. Indeed, it raises constitutional problems of its own.

The settlement plan imposes a number of burdens and penalties on class members who exercise their constitutional rights to a jury trial. The claimant may not file a tort suit until he or she has endured a series of administrative petitions, mediation and arbitration. A plaintiff who prevails at trial may recover no more than $500,000 in compensatory damages. App. 607a. Those who choose mediation or arbitration face no predetermined limit. Moreover, judgments for tort plaintiffs are to be paid in installments, spread out over 5 to 10 years, without interest. Those who choose mediation or arbitration of their claims are paid in three years. See App. 605a-606a.

This explicit discrimination against the exercise of a fundamental right expressly guaranteed by the constitution plainly violates the equal protection clause of the Fourteenth Amendment. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33 & 38-39 (1973). As ATLA explains in Part IV, B, infra, the plan does not represent the means least burdensome to constitutionally protected interests. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974).

B. The Cap On Damages Violates the Seventh Amendment.

The most egregious deficiency of the back-end opt-out is the ceiling on damages. Claimants can recover no more than $500,000 in compensatory damages, regardless of the amount of damages established by the evidence and assessed by the jury. Although this limitation was characterized by Respondent Class as "relatively inconsequential" Brief in Opposition of Respondent Class Representatives Gerald

Ahearn, et al. at 12 & 14, Judge Smith more accurately states that "[s]uch a severe limitation on a party's ability to prove and try damages deprives him of an essential element of a jury trial." 90 F.3d at 1006 (Smith, J., dissenting).

A number of state legislatures have imposed limits on recoverable damages in certain tort cases. One federal court, after careful review of the Seventh Amendment guarantee, concluded that Virginia's $750,000 cap on damages in medical malpractice cases violated the right to trial by jury. *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986), on reconsideration, 672 F. Supp. 915 (W.D. Va. 1987), *aff'd in part, rev'd in part*, 877 F.2d 1191 (4th Cir. 1989):

> [S]ection 8.01-581.15 would require the court to ignore a verdict in an amount above the cap which is supported by evidence and instead enter judgment for the cap amount. This extraordinary requirement bears no relation to the doctrines of remittitur, new trial, and judgment notwithstanding the verdict, and it cannot be founded upon the court's inherent power over verdicts and judgments. Indeed, there exists no permissible basis for entering a judgment predetermined by the legislature in place of a judgment on a verdict properly reached by a jury.

647 F. Supp. at 789. On reconsideration, District Judge Michael reaffirmed his conclusion, stating that:

> To be meaningful, the [Seventh] amendment must protect the ability of the jury to make a difference in the outcome of the trial. Clearly, the determination of damages is one of the principal ways by which the jury affects the result of a case.

672 F. Supp. at 921.

The Fourth Circuit, reversing in part, held that the damage cap did not violate the Seventh Amendment. The court based this conclusion, in part, on *Tull v. United States*, 481 U.S. 412 (1987), which the appellate court read as suggesting that the right to a jury trial "may not even extend to the remedy phrase of a civil trial." 877 F.2d at 1196 n.5.

This Court recently made clear that *Tull* held no such thing. *Feltner v. Columbia Pictures Television*, ___ U.S. ___, 118 S. Ct. 1279, 1287-88 (1998). To the contrary "[t]he right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to the copyright owner." *Id.* at 1287. Historically, where the Seventh Amendment applies, it is for the jury to determine the amount of damages. *Id. See also Bank of Hamilton v. Lessee of Dudley*, 2 Pet. 492, 525 7 L.Ed. 496 (1829)(Seventh Amendment requires that the value of compensation for improvements to real property, in a common law action, be determined by a jury.).

Also vindicating District Judge Michael's analysis is this Court's decision in *Hetzel v. Prince William County*, ___ U.S. ___, 118 S. Ct. 1210 (1998). In that per curiam decision, this Court confirmed that a federal judge's authority to order a remittitur where an award is not supported by the evidence, is limited by the Seventh Amendment requirement that the nonmoving party be afforded the option of a new trial so that "both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).[5]

A substantial number of state supreme courts have held that legislative limits on the amount of damages that may be awarded in tort cases -- even where they apply only to noneconomic damages -- violate state constitutional guarantees to the right to trial by jury. *E.g.*, *Moore v. Mobile Infirmary*, 592 So. 2d 156 (Ala. 1991); *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987); *Sofie v.*

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[5] Indeed, the Virginia Supreme Court has recently ruled that additur violates its constitutional right to trial by jury, relying heavily on *Dimick Supinger v. Stakes*, ___ Va. ___, 495 S.E.2d 813 (1998). In addition, the court has granted review in a case that urges the court to revisit the issue of whether the damage cap violates the state constitution. *Pulliam v. Coastal Emergency Services*, No. 980659, rev. granted June 11, 1998.

Fibreboard Corp. , 112 Wash. 2d 636, 771 P.2d 711 (Wash. 1989).[6]

It is clear, ATLA submits, that the back-end opt-out provided by the settlement does not preserve the Seventh Amendment right to trial by jury and does not bring the lower court's action into compliance with the Rules Enabling Act.

IV. THE CONSTITUTIONAL RIGHTS OF FUTURE VICTIMS CAN BE PRESERVED WITHOUT DESTROYING THE CLASS ACTION SETTLEMENT.

A. The Seventh Amendment May Not Be Sacrificed In the Pursuit Of Administrative Efficiency.

The court below and the Respondents herein expend a great deal of ink and energy defending the proposed settlement as the last best hope for rescuing asbestos victims from a tort system that has not served them well. The lower court praised the TDP as more efficient and less expensive than the tort remedies is seeks to replace. 90 F.3d at 985.

It is true that the growing number of civil actions by persons suffering asbestos-related disease presents "an important challenge to the civil justice system." Deborah R.

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[6] Other state supreme courts have held that such damage caps in tort cases violate a variety of other state constitutional provisions. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997)(damage cap violates separation of powers provision and prohibition of special legislation); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988)(violates right to jury trial and right to remedy), *overruled in part Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (N.H. 1978)(violates state equal protection guarantee); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (violates equal protection); *Morris v. Savoy*, 61 Ohio St 3d 684, 576 N.E.2d 765 (Ohio 1991)(violates due process); *Reynolds v. Porter*, 760 P.2d 816 (Okla. 1988)(violates equal protection); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996)(violates due process); *Lucas v. United States*, 757 S.W.2d 686 (Tex. 1988)(violates open courts guarantee); *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989)(violates due process).

Hensler, Asbestos Litigation In the United States: A Brief Overview (RAND Institute For Civil Justice 1992). However, it must also be recognized that this situation has been imposed on our courts by a long and egregious pattern of wrongdoing by the asbestos industry. Ronald L. Motley, Susan Nial, *A Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?*, 13 Cardozo L. Rev. 1919 (1992)(detailing the "sordid history" of the asbestos industry's deliberate exposure of American workers to asbestos and its cover-up of the tragic consequences); *Borel v. Fibreboard Corp.*, 493 F.2d 1076, 1084-86, 1092-94 (5th Cir. 1973)(reviewing evidence that defendants ignored known dangers of asbestos and failed to warn workers). In their efforts to meet this challenge, courts must not inflict a second injury on asbestos victims by eliminating their constitutional rights.

Administrative efficiency, though laudable, does not trump the Seventh Amendment. The *Granfinanciera* Court emphasized this point:

> It may be that providing jury trials in some fraudulent conveyance actions . . . would impede the swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations. But 'these considerations are insufficient to overcome the clear command of the Seventh Amendment.'

492 U.S. at 63, quoting *Curtis v. Loether*, 415 U.S. at 198.

As then-Justice once observed:

> [N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment . . .
>
> The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury was surely a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other

> provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the right secured by the Amendment.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 346 (1979) (Rehnquist, C.J., dissenting).

B. The Constitutional Rights Of Future Victims Can Be Preserved By Permitting Victims of Asbestos Disease To Opt Out At The Time When Injury Becomes Manifest.

As a practical matter, the notion that this Court must choose between the benefits promised by the settlement plan so laboriously negotiated by Respondents and the constitutional rights of individual asbestos victims is a false choice. As noted earlier, ATLA does not oppose the use of class actions to meet the challenge of mass tort litigation, provided that the right to trial by jury is preserved for each and every claimant as demanded by the Seventh Amendment. ATLA submits that the settlement plan in this case could have been crafted to preserve Seventh Amendment rights.

The settlement's insistence that the class members' tort causes of action be extinguished immediately -- even for those who will not develop asbestos disease until some future date -- resurrects an old injustice. Under rigid statutes of limitations or statutes of "repose," a person's cause of action in tort could become time-barred even before any harm occurred or became manifest. The unfairness of the harsh rule was forcefully portrayed by Judge Jerome Frank:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted as a sort of logical axiom that a statute of limitations does not begin to run against a cause of action before that cause of action exists.

Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952). Nearly every jurisdiction has replaced this harsh result with a "discovery rule," under which the time limit does not begin to run until the person knows or should have known of his or her injury. *See, e.g., Urie v. Thompson*, 337 U.S. 163 (1949). This rule applies with particular force in state product liability actions involving product-related diseases that become manifest only after a long latency period. A leading treatise opines: "The fairness and justice of the [discovery] rule is evident. It would be a travesty of justice if a plaintiff were to lose a meritorious cause of action where he had no way of knowing that an injury or illness was product related." 2A Louis R. Frumer and Melvin I. Friedman, PRODUCTS LIABILITY §12.02[3] at 12-28 (1991).

There is no inherent reason why this state law discovery rule could not have been incorporated into the settlement plan. Specifically, the settlement could provide that members of the exposure-only class have an opportunity at the time they develop an asbestos-related disease or injury to opt out of the class and pursue a civil action in tort. The claimant would be required to exercise this option before the expiration of the applicable state statute of limitations, generally a period of years starting from when the claimant knew or should have known of his or her asbestos-related injury. In other words, the asbestos victim would retain the right to opt out of the settlement and file suit within the same time restrictions that would have controlled in the absence of the settlement. Any tort action would be governed by state law, not subject to the restrictions imposed by the settlement plan and not limited to $500,000.

ATLA suggests that preserving claimants' jury rights would not impose an unreasonable burden on Fibreboard, its insurers, or on the settlement class. It is true that permitting jury trials to coexist with the settlement plan introduces some uncertainty in the process. However, the plan was willing to tolerate the uncertainty of tort trials, albeit in a burdensome and restrictive fashion. The fact is that the vast majority of

asbestos cases -- well over 99% -- end in settlement. Hensler, *supra,* at 9; *In re Joint E. & S. Dists. Asbestos Litigation,* 129 B.R. 710, 747 (E. & S.D.N.Y. 1991). If the TDP in fact provides a fair and efficient alternative, there is no reason to anticipate a significant increase in jury trials.

Nor would the removal of the damage limitations be fatal to the settlement plan. Respondents concede that the limits are "relatively inconsequential" because judgments against Fibreboard in excess of $500,000 have been "exceedingly rare." Brief in Opposition of Respondent Class Representatives Gerald Ahearn, at 13 n.6.

Indeed, such a provision would benefit the entire class. Aware that asbestos victims can "vote with their feet," administrators of the TDP have a strong incentive to make certain that it is a fast, fair and efficient alternative to a tort trial.

Finally, a delayed opt-out would go a long way toward eliminating the difficult constitutional problems that troubled this Court in *Amchem*: The impossibility of giving meaningful notice to persons who have no symptoms of asbestos disease and the problem of whether such persons have a sufficient injury in fact to present a case or controversy for purposes of federal jurisdiction under Article III. 117 S. Ct. at 2252 & 2244 n.15.

These advantages have persuaded a number of commentators to recommend the use of a delayed opt-out as a means of preserving the rights of future claimants. *See* Brian Wolfman and Alan B. Morrison, *Representing The Unrepresented In Class Actions Seeking Monetary Relief,* 71 N.Y.U. L. Rev. 439, 478 (1996); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum. L. Rev. 1343, 1448-49 (1995); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective,* 80 Cornell L. Rev. 941, 964-68 (1995). Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions,"* 80 Cornell L. Rev. 811, 836 (1995).

At least one court has approved a class action settlement that included just such a delayed opt-out for class members who may suffer injury in the future. In *Bowling v. Pfizer, Inc.,* 143 F.R.D. 141 (S.D. Ohio 1992), *appeal dism.* 995 F.2d 1066 (6th Cir. 1993), a class action by patients who received defective artificial heart valves, the settlement agreement expressly provides that class members whose heart valves fracture in the future may opt to reject guaranteed compensation and sue for damages at that time. *Id.* at 150.

Addressing the challenge of asbestos litigation does not require courts to sacrifice the constitutional right to trial by jury.

CONCLUSION

For these reasons, amicus respectfully urges this Court to reverse the decision below.

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August 6, 1998